July 27, 2018

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

On Thursday, July 26, 2018, Alton Burton, Jr. (Frontier), Roy Litland (Verizon), Nick Alexander (CenturyLink), and Jonathan Spalter, Jon Banks and I (of USTelecom) met with Elizabeth McIntyre, Legal Advisor to Commissioner Jessica Rosenworcel, to discuss the above-referenced proceeding.[1] During our meeting we emphasized our shared goals with the Federal Communications Commission (Commission) of increasing broadband availability and competition in the provision of high-speed services by moving forward with the draft order's proposal to create a presumption that ILECs are entitled to competitively neutral rates when attaching to investor-owned utility (IOU) poles. The Commission has adopted this approach in previous pole actions and has been upheld on appeal, as discussed below.

The Commission Should Adopt a Modified Telecommunications Rate Presumption for All Agreements Governing ILEC Attachments

We expressed concerns, however, that while the draft order would adopt the modified telecommunications rate as the presumptively "just and reasonable rate" for ILEC attachers,[2] it would do so only for "newly-negotiated pole attachment agreements" between ILEC attachers and electric utilities.[3] We explained that such an approach was too narrow, and would not attain the Commission's stated goal of "accelerat[ing] the deployment of next-generation

[1] Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (released April 21, 2017) (*Notice*).

[2] Third Report and Order and Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC-CIRC1808-03, ¶ 117 (released July 12, 2018) (*Draft Order*).

[3] *Id.*, ¶ 114.

infrastructure so that consumers in all regions of the Nation can enjoy the benefits of high-speed Internet access as well as additional competition."[4] For example, no matter how wrong the IOU was regarding any (long since passed) purported benefits of an existing joint-use agreement, the IOU would now have every incentive to let these agreements – in many cases thirty, forty, fifty years old and greater – languish in "evergreen" status at unreasonable rates, entirely refusing to renegotiate. Indeed, some of our members have experienced such tactics in the past.[5] Under such conditions, litigation would be considerably more likely, not less.

We explained that ILECs have no leverage to get IOUs to the bargaining table to negotiate a new agreement.[6] For instance, the Enforcement Bureau's 2017 *Dominion* decision found that the ILEC "'genuinely lack[ed] the ability to terminate' the agreements,'" and USTelecom has every reason to believe that the *Dominion* situation is generally representative of ILEC agreements.[7] As a practical matter, ILECs cannot threaten removal of electric facilities because doing so would create a public safety hazard, and traditionally, joint use agreements do not allow for ILECs to remove electric facilities from poles. At the same time, unlike other attachers, ILECs have no right of attachment,[8] so if ILECs refuse to pay unreasonable rates under "evergreen" contracts, IOUs can prevent ILECs from any new build opportunities such as new subdivisions and fiber-to-the-cell 5G deployments. Given these uneven negotiating postures, ILECs have no way to get IOUs to the negotiating table if IOUs refuse to negotiate, as would be the case if the modified telecom rate presumption applies to only new agreements.

We also explained the lack of any meaningful benefits associated with joint use agreements and the extensive record in the proceeding showing that there are no such benefits.[9] As USTelecom explained at length in its June 6, 2018 *ex parte*, any benefits, whether

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[4] *Notice*, ¶ 5.

[5] *See* Ex Parte Notice, from Roy Litland, Verizon, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84, p. 3 (submitted July 26, 2018) (*Verizon Ex Parte*).

[6] *Id.*, pp. 2 – 6.

[7] *See*, *Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a/ Dominion Virginia Power*, Order, 32 FCC Rcd 3750 ¶ 14 (2017) (*Verizon v. Dominion Power*). *See also* Order, *Verizon Florida LLC v. Florida Power and Light Company*, 30 FCC Rcd 1140, ¶ 25, (2015) (*Florida Power and Light Order*) (stating "this appears to be a case in which 'an incumbent LEC . . . genuinely lacks the ability to terminate an existing agreement") (citation omitted, alteration in original).

[8] *See* 47 U.S.C. § 224.

[9] *See, e.g.*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 at 4-7 (submitted June 6, 2018) (*USTelecom June 6th Ex Parte*). Ex Parte Letter from Frank Simone, AT&T, to Marlene Dortch, FCC, WC Docket No. 17-84, at 4 (July 23, 2018) (*AT&T Ex Parte*) (explaining that "[b]ecause joint use agreements were negotiated decades ago, many of the terms perceived as beneficial are in

financial or operational, are virtually non-existent, just as the Enforcement Bureau found in *Dominion*.[10] Further, to the extent there were ever such benefits, they accrued at the time of attachment, which in the vast majority of cases was generations ago (and at a time when ILECs were still rate-of-return regulated). Indeed, in the most recent case addressing the issue, the Enforcement Bureau found the IOU's claims regarding any such benefits were "overstated," and that the IOU's response to the complaint did not "quantify the purported material advantages" received by the ILEC.[11]

This underscore the findings of USTelecom's November 2017 survey (USTelecom Analysis)[12] which showed that pole attachment rates paid by ILECs to IOUs have not declined despite the Commission's expectations in its 2011 Pole Attachment Order.[13] In contrast, pole attachment rates ILECs charge cable and competitive local exchange carriers (CLECs) with whom ILECs compete have decreased. Thus, the "wide disparity in pole rental rates," that the Commission recognized as a barrier to broadband deployment in 2011,[14] has in fact widened. The survey also showed a significant difference in the ratio between the number of IOU poles to which ILECs attach and the number of ILEC poles to which IOUs attach, thereby creating an environment whereby "bargaining power is heavily skewed to the IOUs."[15]

USTelecom therefore proposed that the Commission conclude that the modified telecom rate should be the presumptive just and reasonable rate for ILEC attachers in all agreements. If an incumbent LEC were to file a complaint, an IOU could still overcome the presumption and justify a higher rate by showing that the net benefits, if any, an ILEC receives "far outstrip the benefits accorded to other pole attachers."[16] If the Commission decides to apply the telecom rate presumption to only new agreements, the Commission should make

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fact not"). *Verizon Ex Parte*, at 4-6 (July 26, 2018) (explaining that Verizon "ha[s] not yet identified an existing agreement that provides us a net material advantage over competitors as the power companies claim").

[10] *See USTelecom June 6th Ex Parte* at 4 – 7.

[11] *See Verizon v. Dominion Power* ¶¶ 18, 20, 22; *see also* Letter from Kevin G. Rupy, USTelecom, to Marlene Dortch, Docket No. 17-84 at 2 (Dec. 8, 2017).

[12] *See*, Ex Parte Notice, from Kevin G. Rupy, USTelecom, to Marlene Dortch, Federal Communications Commission, WC Docket No. 17-84 (submitted November 21, 2017) (*USTelecom Analysis*).

[13] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, (released April 7, 2011) (*2011 Pole Attachment Order*).

[14] *Id.*, ¶ 3.

[15] *USTelecom Analysis*, p. 7.

[16] *See, e.g.*, *Notice* ¶ 45.

clear that the term "new agreement" applies to agreements that, following the effective date of the order, are renewed (including auto-renewed), extended, placed in evergreen status by the action of either party, or for which a party invokes a contractual renegotiation provision. Any narrower definition could create an improper incentive for power companies to try to lock in existing inflated rates by refusing to renegotiate them, even in the event of termination.

As recently noted by AT&T, the current draft order could "leave ILECs in a virtual no-man's land," since ILECs have no mandatory right of pole access under Section 224. Moreover, absent the presumption, IOUs would not need to enter into new agreements with ILECs and would have no incentive to do so when it would mean lower rates.[17] Extending the modified telecom rate presumption to all agreements, coupled with the right to refunds for overpayments as far back as the statute of limitations allows, would provide additional guidance to the industry and the appropriate incentive for IOUs to negotiate rate reductions that are consistent with the Act and the Commission's objective of removing rate disparities and promoting broadband deployment.

We also discussed the integral role that reforms to pole attachment rates could play in the deployment of 5G networks. As Chairman Ajit Pai stated this week in testimony before Congress, the Commission can "make all of the spectrum in the world available for 5G service, but it won't make a difference if the physical infrastructure isn't in place to carry this traffic."[18] He further emphasized the importance of promoting "the deployment of wireline infrastructure, which is essential to carry the massive amounts of 5G traffic that we anticipate."[19]

USTelecom agrees, and our member companies are aggressively deploying fiber networks to achieve this goal. However, they are at an increasing competitive disadvantage due to the significant disparity in pole attachment rates as evidenced in the USTelecom Analysis.[20] Moreover, deployment timelines are hindered due to protracted negotiation disputes (that can often prevent ILECs from deploying new facilities until an agreement is reached with the IOU), and subsequent, lengthy complaint proceedings. By adopting this approach, the Commission can avoid such unnecessary delays, and best achieve its goal of

[17] *See*, *AT&T Ex Parte*, p. 4.

[18] Statement of Chairman Ajit Pai, Federal Communications Commission, Hearing on "Oversight of the Federal Communications Commission" Before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, July 25, 2018 (available at: https://docs.fcc.gov/public/attachments/DOC-352944A1.pdf) (visited July 26, 2018).

[19] *Id*.

[20] *See*, *USTelecom Analysis*.

ensuring the deployment of the infrastructure necessary for 5G by introducing greater balance to the negotiation process between IOUs and ILECs during pole attachment negotiations.

Moreover, adopting this approach would not raise concerns regarding contractual issues. The Commission's Enforcement Bureau has previously concluded that making a showing that prospectively applying a just and reasonable rate is arbitrary and capricious is a "heavy burden."[21] It further noted that "the Commission has applied a new rate to existing pole attachments on many occasions and has been upheld on appeal."[22]

If the Commission Does Not Adopt USTelecom's Above Proposal, the Commission Should at a Minimum Revise the Draft Order to Clarify that the *2011 Pole Attachment Order*'s Guidance Still Applies to Existing Agreements

In the event that the Commission decides not to grant any of the relief discussed above, the following proposed changes to the draft order are intended to make clear that the guidance in the *2011 Pole Attachment Order* still applies to existing agreements. Proposed redline edits to the draft are discussed below, and are included as an appendix to this filing.

Draft Order, Paragraph 118. USTelecom recommends proposed edits to address possible overstatement of the findings of the 2011 Pole Attachment Order relating to joint use agreements. Specifically, the second sentence of paragraph 118 suggests that the Commission does not intend to interfere with any existing joint use agreements and cites paragraph 216 of the 2011 Pole Attachment Order.[23] However, while paragraph 216 expresses reluctance to interfere with pre-2011 Order agreements, the Commission expressed no such concerns about reviewing post-2011 Order agreements.

Regarding the third sentence, USTelecom is not aware of any previous Commission finding that historical joint use agreements did in fact provide material benefits. The third sentence cites paragraph 216 and footnote 654 of the 2011 Pole Attachment Order.[24] Neither paragraph 216 nor footnote 654 made such a finding, with the latter merely summarizing the arguments of various commenters. In other words, rather than supporting a previous Commission finding, the draft Order merely relies on the assertions of previous commenters. The draft Order should therefore be adjusted to reflect this.

Regarding proposed edits to the last sentence, USTelecom is concerned that certain statements in the draft order could be read to backtrack from the 2011 Pole Attachment Order.

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[21] *See*, *Florida Power and Light Order*, ¶ 18.

[22] *Id.*, n. 61.

[23] *Draft Order*, ¶ 118 (citing *2011 Pole Attachment Order*, ¶ 216).

[24] *Id.* (citing *2011 Pole Attachment Order*, ¶ 216, fn. 654).

The current order should have a clear statement that the Commission's previous guidance still applies to existing agreements.

Draft Order, Paragraph 117, Footnote 392. The Commission should also consider changing its current language, which could be wrongly read to suggest that ILECs cannot continue to seek rate relief for agreements entered into before the 2011 Pole Attachment Order. The revisions are intended to make clear that ILECs can still seek rate relief under those pre-2011-Order agreements.

Draft Order, Paragraph 119. USTelecom recommends that the Commission revise its language in this paragraph, since the current language inaccurately could be read to suggest that the Commission previously adopted conclusions on the issues in question. However, the referenced text does not support such a finding, since it merely highlights comments submitted by various parties in previous proceedings. Specifically, the second sentence of paragraph 119 implies that the Commission has previously found material benefits for ILECs from joint use agreements. It then cites footnote 654 of the 2011 Pole Attachment Order for support.[25] However, footnote 654 of the 2011 Pole Attachment Order merely summarizes the arguments of various commenters, and does not make an affirmative Commission finding.[26]

Draft Order, Paragraph 115. The second sentence of paragraph 115 should be revised to clarify that the reference to purported ILEC benefits under joint use merely reflects the contention of some commenters in this proceeding, and does not constitute a factual finding by the Commission. As far as USTelecom is aware, the Commission has never made a general finding that the historical joint usage agreements did in fact provide material benefits to ILECs, particularly given the wide variety of terms in those agreements. As noted previously, footnote 654 of the 2011 Pole Attachment order merely summarized earlier commenters' arguments supporting this view, and did not make an affirmative finding that such net benefits exist. Subsequent Enforcement Bureau references to alleged ILEC benefits under joint use similarly cited to footnote 654 of the 2011 Pole Attachment Order.[27]

Draft Order, Paragraphs 114, 119 and 120. In its 2011 Pole Attachment Order, the Commission discussed the importance of clarifying that ILEC attachers must receive "net" benefits that materially advantage it over other attachers. Specifically, the Commission stated that, "[a]s a higher rate than the regulated rate available to telecommunications carriers and cable operators, [the pre-existing telecom rate] helps account for particular arrangements that provide *net* advantages to incumbent LECs relative to cable operators or telecommunications

[25] *2011 Pole Attachment Order*, fn. 654.

[26] *Id*.

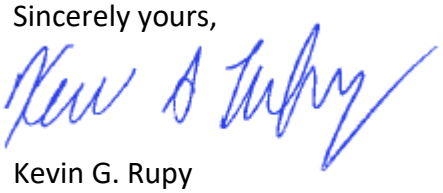
[27] *See*, Order, *Verizon Florida LLC v. Florida Power and Light Company*, 30 FCC Rcd 1140, ¶ 6, n. 14, (2015); *see also*, Verizon *v. Dominion Power*, ¶ 4 n.13.

carriers."[28] In order to conform the Commission's findings from its 2011 Pole Attachment Order with the current Draft Order, USTelecom recommends inclusion of the phrase "net" in paragraphs 114, 119 and 120 of the Draft Order. The recommended insertions are identified in Appendix A.

Draft Order, Paragraph 117, Footnote 392. The current text could be read to make an unnecessary and unjustified finding that accepts as true the IOUs' view about the content of potential pole attachment licensing agreements between ILECs and electric utilities. There is no need or basis to make such a finding, especially on IOU claims about paying "per attachment."[29]

Please contact the undersigned should you have any questions.

Sincerely yours,



Kevin G. Rupy
Vice President, Law & Policy

cc: Elizabeth McIntyre

[28] *See*, *2011 Pole Attachment Order*, ¶ 218.

[29] *Draft Order*, fn. 393.

Appendix A

In the event that the Commission decides not to adopt the proposal in the accompanying USTelecom *ex parte*, the Commission should at a minimum revise the draft order to clarify that the *2011 Pole Attachment Order*'s guidance still applies to existing agreements.

Paragraph 118: In the first sentence, after the word "We " delete "agree with" and insert "acknowledge the position of." In the second sentence, delete the following text: ", and it is not our intent to interfere with the arm's-length benefits previously bargained for by parties to existing joint use agreements." In the third sentence, insert "may" between "agreements" and "give." Add the following sentence to the end of paragraph 118: "For existing agreements, the *2011 Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply."

Redlined text:

We ~~agree with~~acknowledge the position of electric utility commenters that reversing the current presumption would disrupt joint use relationships between them and incumbent LECs~~, and it is not our intent to interfere with the arm's-length benefits previously bargained for by parties to existing joint use agreements~~. Rather than treating incumbent LECs similarly to other parties, the record indicates that existing joint use agreements may give incumbent LECs benefits beyond those granted to other parties and typically were negotiated long ago at a time of more equal bargaining power between the parties. For existing agreements, the *2011 Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply.

Para. 117, footnote 392, second sentence: Replace "are" with "were" and delete "after that Order and."

Para. 117, footnote 392, third sentence: Replace "extends to" with "includes."

Redlined text:

"A new pole attachment agreement is one entered into after the effective date of this Order. Consistent with the Commission's conclusion in 2011, the pre-2011 pole attachment rate for telecommunications carriers will continue to serve as a reference point in complaint proceedings regarding agreements that materially advantage an incumbent LEC and which ~~are~~were entered into ~~after that Order and~~ before the effective date of the Order we release today. *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218. This ~~extends to~~includes circumstances where an agreement has been terminated and the parties continue to operate under an "evergreen" clause."

Paragraph 119, second sentence: Delete "As the Commission has previously found," and replace it with "Commenters contend that."

Redlined sentence:

"~~As the Commission has previously found,~~Commenters contend that such material benefits include: "[p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.""

Paragraph 115, second sentence: Insert "Some commenters contend that" at the beginning of the sentence.

Redlined sentence:

Some commenters contend that t~~T~~hese joint use agreements provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make- ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.

Para. 114, last sentence: Insert "net" between "receives" and "benefits."

Para. 119, first sentence: Insert "net" between "receives" and "benefits."

Para. 120, second sentence: Insert "net" between "to" and "materially" and insert "as compared to other attachers" after "LEC."

Para. 120, third sentence: Insert "net" between "receive" and "material."

Para. 117, footnote 393, second sentence: Replace "As the" with "The" and insert "that" after "comment."

Redlined sentence:

~~As the~~The Electric Utilities comment that, under new pole license agreements, "ILECs and the Electric Utilities would be permitted to attach to each other's new poles as licensees on terms similar to those the Electric Utilities offer to other wireline licensees. This would mean, by way of example, that ILECs would be required to follow the Electric Utilities' permitting processes, would not be guaranteed the lowest space on the pole, would pay annual rental on a per attachment (and not a per pole) basis, would be required to pay full make-ready costs, would be required to meet insurance, security, and indemnification requirements, and would not be afforded the historical deference afforded to ILECs as co-custodians of the joint use network."